

## DEPARTMENT OF STATE REVENUE

04-20140356.LOF

**Letter of Findings Number: 04-20140356**  
**Use Tax**  
**For Tax Years 2011-13**

**NOTICE:** IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

**HOLDING**

The retail merchant was able to show that some, but not all of its purchases were exempt from use tax. The imposition of use taxes was correct in part and incorrect in part.

**ISSUE****I. Use Tax—Imposition.**

**Authority:** IC § 6-8.1-5-1; IC § 6-2.5-3-2; IC § 6-2.5-4-1; IC § 6-2.5-1-5; Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Dept. of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579 (Ind. 2014); Carroll County Rural Electric Membership Corp. v. Indiana Dept. of State Revenue, 838 N.E.2d 564 (Ind. Tax Ct. 2005); Wendt LLP v. Indiana Dept. of State Revenue, 977 N.E.2d 480 (Ind. Tax Ct. 2012); [45 IAC 2.2-3-4](#); [45 IAC 2.2-5-26](#); [45 IAC 2.2-4-3](#); [45 IAC 2.2-4-4](#); [45 IAC 2.2-4-2](#).

Taxpayer protests proposed assessments of use tax arguing that some purchases listed were exempt.

**STATEMENT OF FACTS**

Taxpayer is an Indiana retail merchant. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had not remitted the correct amount of use tax for the tax years 2011, 2012, and 2013. The Department therefore issued proposed assessments for use tax. Taxpayer protests the proposed assessments on the basis that some of the purchases listed should be exempt from use tax. An administrative hearing was held and this Letter of Findings results. Additional facts will be provided as necessary.

**I. Use Tax—Imposition.****DISCUSSION**

Taxpayer protests the imposition of use tax on certain purchases which the Department had determined were subject to sales and use tax for the tax years 2011, 2012, and 2013. The Department based its determination on its review of Taxpayer's records for 2012. If there was no invoice for a particular transaction or if the invoice did not show sales tax paid at the point of purchase, the Department included that purchase as subject to use tax. The total of expensed purchases without sales tax paid was compared against all purchases to arrive at a sales and use tax error rate. That rate was then applied to Taxpayer's total purchases for all three years under audit. Taxpayer protests that some of the transactions which the Department determined were subject to use tax were not subject to sales or use tax. Taxpayer provided a list of items which it believes were not subject to sales or use taxes.

As a threshold issue, it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." Indiana Dept. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007). Consequently, a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position is wrong. Further, "[W]hen [courts] examine a statute that an agency is 'charged with enforcing. . . [courts] defer to the agency's reasonable interpretation of [the]

statute even over an equally reasonable interpretation by another party." Dept. of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579, 583 (Ind. 2014). Thus, all interpretations of Indiana tax law contained within this decision, as well as the preceding audit, shall be entitled to deference.

Use tax is imposed by IC § 6-2.5-3-2(a), which states:

An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

[45 IAC 2.2-3-4](#) further explains:

Tangible personal property, purchased in Indiana, or elsewhere in a retail transaction, and stored, used, or otherwise consumed in Indiana is subject to Indiana use tax for such property, unless the Indiana state gross retail tax has been collected at the point of purchase.

Therefore, when tangible personal property is used, stored, or consumed in Indiana, use tax is due unless sales tax was paid at the time of the transaction.

### **A. Automotive Subscriptions**

Taxpayer protests the Department's tax assessment on its subscription to two automotive publications. [45 IAC 2.2-5-26](#) states:

(a) General rule. In general, sales of all publications irrespective of format are taxable. The exemption provided by this rule is limited to sales of newspapers.

(b) Application of general rule. For purposes of the state gross retail tax, the term "newspaper" means only those publications which are:

- (1) commonly understood to be newspapers;
- (2) published for the dissemination of news of importance and of current interest to the general public, general news of the day, and information of current events;
- (3) circulated among the general public;
- (4) published at stated short intervals;
- (5) entered or are qualified to be admitted and entered as second class mail matter at a post office in the county where published; and
- (6) printed for resale and are sold.

(c) Publications which are primarily devoted to matters of specialized interest such as business, political, religious, or sporting matters may qualify for exemption if they also satisfy the criteria listed in subsection 26 of this rule [subsection (b) of this section].

(Emphasis in original).

Automotive News qualifies as a newspaper pursuant to the requirements in [45 IAC 2.2-5-26](#), and is therefore exempt from sales and use tax. In Carroll County Rural Electric Membership Corp. v. Indiana Dept. of State Revenue, the court found that the REMC possessed the common characteristics of a newspaper as specified by the Department's regulations because it carried less than a preponderance of advertising, it was authorized to carry legal advertising, it had a masthead setting forth the publisher, editor, circulation, and place of publication. Carroll County Rural Electric Membership Corp. v. Indiana Dept. of State Revenue, 838 N.E.2d 564, 567 (Ind. Tax Ct. 2005). In addition, its physical characteristics more closely resembled those of a newspaper than a magazine. Automotive News resembles these characteristics outlined by the court, and therefore can be qualified as a newspaper, which exempts it from sales and use tax.

Black Book does not satisfy the requirements in [45 IAC 2.2-5-26](#) to be classified as a newspaper and exempted from sales and use tax. Taxpayer argues that it is a weekly subscription, and so it should qualify for exemption. However, Black Book is a special interest publication which is not commonly understood to be a newspaper. It is published for merchants who sell cars, not for the general public. Therefore, under [45 IAC 2.2-5-26](#) and Carroll County Rural Electric Membership Corp., it is subject to sales and use tax.

### **B. Freight**

Taxpayer protests the Department's tax assessment on freight charges for automotive parts delivered to it. The Department refers to IC § 6 2.5-4-1(e), which provides that:

The gross retail income received from selling at retail is only taxable under this article to the extent that the income represents:

- (1) the price of the property transferred, without the rendition of any service; and
- (2) except as provided in subsection (g), any bona fide charges which are made for preparation, fabrication, alteration, modification, finishing, completion, delivery, or other service performed in respect to the property transferred before its transfer and which are separately stated on the transferor's records.

[45 IAC 2.2-4-3](#)(a) further explains:

Separately stated delivery charges are considered part of selling at retail and subject to sales and use tax if the delivery is made by or on behalf of the seller of property not owned by the buyer.

Therefore, a retail merchant is required to pay use tax on the total amount of a transaction, including freight charges. Taxpayer argues that the freight charge should be exempt because it is stated separately from the cost of the automotive parts on the invoice. However, separately stated freight charges are not exempt pursuant to [45 IAC 2.2-4-3](#)(a).

### **C. Windshield Washer Fluid**

Taxpayer protests the Department's tax assessment on its purchase of windshield washer fluid. Taxpayer claims the windshield washing fluid was purchased to resell to customers and, therefore, pursuant to [45 IAC 2.2-4-4](#), it is exempt. Taxpayer did not provide documentation to prove that any of the windshield washing fluid was ever resold to a customer. Therefore, Taxpayer did not provide sufficient documentation to show that its purchase of windshield washing fluid was for resale and that the wholesale exemption applied to that purchase. In the absence of documentation identifying a sale to a customer, the Department is not able to conclude that the [45 IAC 2.2-4-4](#) exemption applied to Taxpayer's purchase.

### **D. Postage**

Taxpayer protests the Department's tax assessment on its purchase of postage for a sales campaign. IC § 6-2.5-1-5(b) provides in part that:

Gross retail income does not include that part of the gross receipts attributable to:

- ...
- (8) Postage charges that are separately stated on the invoice, bill of sale, or similar documents.

Taxpayer provided documentation in the form of an invoice from a vendor showing the postage charge was separately stated. Therefore, pursuant to IC § 6-2.5-1-5(b), the postage fee charged is exempt. Taxpayer also estimates another postage charge from the same company, but did not substantiate it with documentation. Since Taxpayer was unable to produce documents to show the purchase included a postage charge, Taxpayer has not met the burden imposed under IC § 6-8.1-5-1(c).

### **E. Advertising**

Taxpayer protests the Department's tax assessment on its purchase of advertising services, including newspaper, television, radio, etc. The Department refers to [45 IAC 2.2-4-2](#)(a), which provides that:

Professional services, personal services, and services in respect to property not owned by the person rendering such services are not "transactions of a retail merchant constituting selling at retail", and are not subject to gross retail tax.

Therefore, purchases of professional services are not subject to sales or use tax. Taxpayer provided documentation in the form of invoices showing purchases of advertising services from a vendor. After review, these invoices establish that Taxpayer was paying for services only with no tangible personal property purchases. These services are exempt from use tax. However, Taxpayer's purchases are exempt from use tax only to the extent it can substantiate the purchases were for services and not for tangible personal property. Taxpayer did not provide invoices for the remaining purchases it claimed were for advertising, and so Taxpayer has not met the burden imposed under IC § 6-8.1-5-1(c).

### **F. Accounting Entries**

Taxpayer claims that several items in the audit were accounting entries, not purchases subject to use tax. However, Taxpayer did not provide any additional documentation or analysis to establish what these entries were. As explained during the hearing and in the Department's letter setting the hearing, the protest process is a taxpayer's opportunity to clearly explain its protest and to provide relevant and cogent supporting documentation. Taxpayer has not presented a sufficiently developed argument for the Department to address. See *Wendt LLP v. Indiana Dept. of State Revenue*, 977 N.E.2d 480, 485-6 n.9, (Ind. Tax Ct. 2012) (stating in a footnote parenthetical "that poorly developed and non-cogent arguments are subject to waiver" by the Indiana Tax Court) (Citing *Scopelite v. Indiana Dept. of Local Gov't Fin.*, 939 N.E.2d 1138, 1145 (Ind. Tax. Ct. 2010)). Taxpayer has not met the burden of proving the proposed assessments wrong, as required by IC § 6-8.1-5-1(c).

In conclusion, Taxpayer's protest is sustained regarding the subscription to Automotive News, the postage charge substantiated by an invoice, and the advertising charges substantiated by invoices. Taxpayer's protest is denied regarding the subscription to Black Book, the freight charges, the windshield washer fluid, the unsubstantiated advertising charges, and the accounting entries. The Department will remove those items upon which Taxpayer was sustained from the numerator of its use tax error rate and will then recalculate the error rate. The revised error rate will then be applied to Taxpayer's overall purchases to calculate revised use tax assessments for the tax years 2011, 2012, and 2013.

### **FINDING**

Taxpayer's protest is sustained in part, and denied in part.

*Posted: 07/29/2015 by Legislative Services Agency*  
An [html](#) version of this document.